No. _____

In The

Supreme Court of the United States

October Term, 1995

GEORGE MARTORANO, a/k/a
COWBOY GEORGE MARTORANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a Sixth Amendment claim of ineffective assistance is based upon a conflict of interest, arising from counsel's participation in crimes linked to the client's offenses, must the "adverse effect" of counsel's conflict be separately proven?

2. Where a Section 2255 motion alleges that counsel provided ineffective assistance because of an impermissible conflict of interest, but does not more specifically plead "adverse effect," can the Sixth Amendment claim be rejected for poor form alone?

3. Can a Sixth Amendment claim of ineffective assistance be made to depend upon proof of innocence, where counsel who bargained the client's guilty plea was acting under an impermissible conflict of interest?

4. Whether under 28 U.S.C. § 2255 the lower courts are free to discredit petitioner's factual allegations, and to adversely determine issues of controverted fact, without an evidentiary hearing?

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PETITION FOR WRIT OF CERTIORARI

George Martorano respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, at A1-A13)[1] is not reported. The opinion of the district court (App., *infra*, at A16-A21) is also unreported.

JURISDICTION

The court of appeals entered its judgment on January 5, 1996 (App., *infra*, at A14-A15). By order dated February 2, 1996, the court of appeals denied Martorano's petition for panel rehearing and suggestion for rehearing *in banc* (App., *infra*, at A22-A23). A final judgment was entered in the court of appeals on February 12, 1996 (App., *infra*, at A24-A25). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

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[1] Appendix are designated as "App. at A___." References to the joint appendix filed with the Third Circuit are designated as "___a."

favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2255:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
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> * * *
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
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> * * *

STATEMENT OF THE CASE

George Martorano is a first-time, non-violent offender, serving a federal sentence of life imprisonment without parole. He has been in custody since September 1983, when at the age of thirty-two he was arrested on federal drug charges. In the ensuing thirteen and a half years of imprisonment, Martorano's saga – and the career of his once-prominent criminal defense lawyer, Robert F. Simone, Esquire – have taken many twists and turns, bringing him now to this Court's door.

The 1983 indictment charged Martorano, in nineteen counts, with various drug offenses and conspiracies. Only one charge – that of managing a continuing criminal enterprise, in violation of 21 U.S.C. § 848 – exposed him to the life sentence he would ultimately receive. The defense attorney who represented Martorano in the district court was Simone, who was later convicted of racketeering activities conducted on behalf of the La Cosa Nostra ("LCN") family of Philadelphia crime boss Nicodemo Scarfo.

From the outset, Simone's representation of Martorano was irregular. Martorano was "approached" by Simone, who "volunteered" to serve as his attorney. Martorano Affidavit, ¶¶ 1 and 2 (39a). Simone never reviewed the more than 100 tape-recorded conversations that the government turned over to him, nor did he discuss with Martorano any strategy for defending the case. Martorano Affidavit, ¶ 8 (40a). The plea "bargain" negotiated by Simone was an open plea to all counts, with a perfunctory assurance by the government of no new charges arising from the same events. Tr. 6/4/84, at p. 10. Relying entirely upon Simone's advice, Martorano pled guilty on June 4, 1984 to *all* nineteen charges.

Martorano was assured by Simone that the sentence would not exceed ten years' imprisonment. Martorano Affidavit, ¶ 9 (40a) ("Mr. Simone told me that my best approach was to proceed to plead guilty and throw myself on the mercy of the Court. He told me that the

judge would sentence me to no more than ten years imprisonment").[2] Simone submitted no presentence memorandum, nor did he review the presentence report with Martorano. Simone also made no effort to recuse the district court judge prior to sentencing – even after that same judge had been ridiculed in the media for testifying as a defense character witness for Simone in July 1984 at his own tax evasion trial.[3]

On September 20, 1984, the district court sentenced Martorano to life without parole.[4] He retained new counsel and appealed. The Third Circuit vacated the sentence and remanded, finding a violation of Fed. R. Crim. P. 32 (inadequate showing that Martorano had opportunity to review and comment upon presentence report). *United States v. Martorano*, No. 84-1568 (3d Cir. 1986) (*Martorano I*).

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[2] Simone later claimed not to have known the meaning of "life, without parole," and admitted that he had never discussed with Martorano the possibility of such a sentence. Affidavit of Robert F. Simone, Nov. 5, 1986, Joint Appendix in *United States v. Martorano*, No. 88-1348 (*Martorano II*), at A69-A71.

[3] On March 1, 1984, Simone was indicted on four counts of income tax evasion. *United States v. Simone*, Crim. No. 84-00085 (E.D. Pa.). At a colloquy held on March 15, 1984, Martorano waived the potential tax-related conflicts stemming from that indictment.

In the proceedings below, the government asserted repeatedly that Martorano's waiver of the tax-related conflicts extended to other undisclosed conflicts, including those of which Martorano had no awareness until years later. The court of appeals did not adopt the government's argument, noting instead that "we do not consider the effect of the waiver following Simone's tax indictment" (App., *infra*, at A12).

[4] Martorano's parole guidelines, rendered irrelevant by the life without parole sentence, had been estimated by the United States Probation Officer at 40-52 months of imprisonment (142a-143a).

On remand, new counsel moved unsuccessfully to withdraw the guilty plea and to recuse the district court judge. On April 27, 1988, the same district judge resentenced Martorano to life imprisonment without parole. Martorano took a second direct appeal, arguing that his recusal motions had been wrongly denied, that the district court had erred in refusing to permit withdrawal of the guilty plea, and that the life sentence violated the Eighth Amendment. The court of appeals rejected those claims and upheld the life sentence. *United States v. Martorano*, 866 F.2d 62 (3d Cir. 1989) (*Martorano II*), *cert. denied*, 493 U.S. 1077 (1990).

There the matter stood, until a remarkable development occurred on March 10, 1992. Some two years after this Court denied certiorari in *Martorano II*, the government unsealed a six-count racketeering indictment against Martorano's former counsel, Simone. Simone and a codefendant, Anthony DiSalvo ("DiSalvo"), were indicted for racketeering, conspiracy, and extortion offenses committed over an eleven-year period on behalf of the Scarfo LCN family.

Simone's indictment brought to light the extraordinary conflicts of interest under which he had labored while representing Martorano in 1984 at his guilty plea and sentencing. *At that very time, Simone was personally engaged in criminal activities – including criminal conduct that, in at least two respects, was closely linked to the same drug offenses for which Martorano faced trial.* Martorano also learned that Simone had in 1984 been the subject of at least two active government investigations, while representing Martorano, and that Simone even then had an overriding personal allegiance to crime boss Scarfo (who was to later put out a murder contract on Martorano's father).

Such facts emerged largely from the government's indictment of Simone and its proof at Simone's trial. According to the government, from January 1, 1980 through October 1, 1991, Simone and his co-defendant DiSalvo conspired with others to conduct the affairs of

the Scarfo LCN through a pattern of racketeering activity and the collection of unlawful debts. Indictment, ¶ 10 (44a-45a). On December 16, 1992, a jury agreed; Simone was convicted of conspiring to so conduct the affairs of the LCN enterprise, in violation of 18 U.S.C. §§ 1962 and 1963.

The conviction established Simone's personal participation in the criminal activities of the Philadelphia LCN, under Scarfo's direction, throughout the time that he was representing Martorano. At sentencing, the government characterized Simone as "a knowing accomplice to Nicodemo Scarfo, one of the bloodiest and most notorious mob bosses in the entire country." Government's Sentencing Memorandum (136a-137a). Simone's conviction was affirmed by the court of appeals on August 31, 1994, in *United States v. Simone*, 34 F.3d 1204 (3d Cir. 1994).

Following Simone's prosecution, Martorano for the first time sought post-conviction relief from the district court. His motion under 28 U.S.C. § 2255 was filed on November 10, 1994. Martorano's Sixth Amendment claim was straightforward: Simone had provided ineffective assistance, because "at the time of guilty plea and sentence, defense counsel was the subject of an impermissible conflict of interest." Martorano Motion, ¶ 12 (21a).

According to Martorano's motion, the prosecution of Simone brought to light the fact "that at the time Mr. Simone advised me to plead guilty and sentence was imposed, he was under active investigation for his personal activities in a continuing criminal organization." *Id.* Martorano alleged that he was previously unaware of Simone's criminal activity and of the government investigations of Simone. Martorano Affidavit, ¶ 3 (39a) ("Until Mr. Simone was indicted and brought to trial in 1992, I

had no knowledge that he was an active, personal participant in a continuing criminal organization").[5] Martorano's motion was accompanied by his own affidavit, as well as a supporting memorandum that detailed Simone's many conflicts of interest while representing Martorano (25a-37a). Appended to the Section 2255 motion were portions of the *Simone* court record, including the indictment (42a-73a), the Government's Trial Brief (75a-134a), its Sentencing Memorandum (136a-140a), and the Third Circuit opinion affirming Simone's conviction (145a-164a).

Martorano's post-conviction filing pointed to an embarrassment of conflicts. *Most significantly, the Simone prosecution had revealed that Simone was directly linked in at least two ways to the very same drug offenses to which Martorano had – on Simone's advice – pled guilty eight years earlier.*

First, while representing Martorano, Simone had threatened Jimmy Milan – a man actually listed in court documents by the government in 1984 as one of Martorano's unindicted co-conspirators – to collect drug monies owed to Martorano. This threat against Milan became part of the government's later case against Simone. Overt Act No. 14 in the Simone conspiracy indictment related how in late 1983 or early 1984, Simone went to Jimmy Milan's restaurant in Philadelphia to collect money from Jimmy Milan (53a). Racketeering Act Six

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[5] Simone's status as a confidant of Scarfo posed special dangers for Martorano, whose family was in disfavor with Scarfo. Scarfo's later death threats against Martorano's father, Raymond Martorano, eventually became a matter of court record. *United States v. Simone*, 34 F.3d 1204, 1208 (3d Cir. 1994). In his § 2255 petition, Martorano specifically alleged that he was "completely unaware until recently" that "the organization represented by Mr. Simone harbored feelings of violence toward me and my family to the point where our lives were threatened." Martorano Affidavit, ¶ 12 (40a).

of the Simone indictment alleged that Simone "did knowingly and intentionally obtain approximately $30,000 from Vincent DiBattista, also known as Jimmy Milan, by threatening to commit other criminal offenses in violation of Title 18, Pennsylvania Consolidated Statutes, Section 3923" (49a). That $30,000 was alleged by the government to be money owed to Martorano on a drug deal. Government's Trial Brief (93a).

Simone was in this way squarely implicated by the government in crimes closely related to the offenses with which Martorano was then charged. *This stunning link to Martorano's own case is conclusively proven by the government itself – which had in 1984 named Jimmy Milan as one of Martorano's unindicted co-conspirators.* Government's Answer to Motion for Discovery, ¶ 6 (263a); *United States v. Rankin*, Crim. No. 83-314(3), voir dire transcript, July 18, 1988, pp. 81-82.[6]

A second such direct link to Martorano's own offenses was Simone's involvement with Anthony DiSalvo. DiSalvo, a reputed LCN loan shark, was indicted along with Simone in the 1992 prosecution. Their trial showed that Simone, at the direction of mob boss Scarfo, was the criminal supervisor of DiSalvo – *the very person alleged to have advanced monies to Martorano in connection with the drug crimes to which Martorano pled guilty.*[7] Martorano Affidavit, ¶ 6 (39a) ("Tony DiSalvo had supplied

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[6] Kevin Rankin was one of Martorano's indicted co-defendants, who went to trial in 1988, when the government again announced during voir dire that Milan was an unindicted co-conspirator in the case.

[7] In the racketeering case, the government characterized Simone as a Scarfo adviser who "shared in the income obtained by the enterprise from certain individuals including DiSalvo. . . ." Trial Brief, p. 3 (78a). DiSalvo was identified as "a loanshark who made unlawful extensions and collections of credit and used the violent reputation of the Scarfo LCN family to collect his extensions of credit." *Id.*

money to me in the past and in connection with the crimes to which I pled guilty"). Martorano also detailed Simone's link to the money DiSalvo provided for drug buys, by virtue of Simone's role as DiSalvo's criminal supervisor in the Scarfo LCN. Martorano Affidavit, ¶ 5 (39a); Indictment, p. 3, ¶ 8 (44a) (by "agreement" with Scarfo, DiSalvo was considered to be "with" Simone, and "Simone shared in income generated" by DiSalvo for the enterprise).

Apart from his personal participation in crimes closely linked to the ones with which Martorano was charged, Simone was also under active government investigation *while he was representing Martorano.* Martorano was unequivocal in his allegations on this very point in his Section 2255 motion: he claimed that the government was investigating Simone *"[a]t the time"* that Simone was representing him. Martorano Motion, ¶ 12A (21a).

Court records, referenced by Martorano in his motion and supporting papers, corroborated that there were at least two FBI investigations of Simone underway in 1983-84. First, Simone was the subject of an FBI investigation into organized crime's influence in the Atlantic City casinos. From as early as 1981, and continuing through 1984, the government tape-recorded Simone repeatedly. Martorano Memorandum, at pp. 9-10 (33a-34a). The FBI undercover investigation spanned an eighteen-month period, between approximately July of 1983 and November of 1984.[8] As alleged in Martorano's § 2255 papers, Simone became aware of this government investigation, but did not disclose it to Martorano. Martorano Memorandum, at pp. 9-10 (33a-34a).

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[8] The undercover FBI agent tape-recorded at least *ten* meetings with Simone, in Simone's law office. The first of these meetings occurred on September 29, 1983, and the last one took place on November 15, 1984.

At about the same time, Simone was implicated in a second government investigation, involving a $650,000 Hobbs Act extortion for which LCN underboss Leonetti was ultimately prosecuted in the District of New Jersey. It is now a matter of court record that, in *April 1984*, Simone was subpoenaed to testify before the federal grand jury conducting that investigation. He invoked his Fifth Amendment privilege. *United States v. Simone*, 627 F. Supp. 1264, 1266 (D.N.J. 1986). On September 20, 1984 (the same day as Martorano's sentencing), Simone received a letter from the government, giving formal notice of what Simone already knew – that he was an "unindicted co-conspirator" in the Leonetti indictment, a witness to conspiratorial acts, and the "subject" of a continuing grand jury investigation. *Id.* at 1266 and 1269. The letter confirmed that Simone had earlier "broached the possibility of receiving immunity" from the government. *Id.* at 1266.[9]

Martorano did not know that Simone was the subject of these pending federal investigations, that Simone had taken the Fifth, or that Simone had "broached" the possibility of immunity for himself. According to Martorano's affidavit, Simone actually concealed the fact of his grand jury appearance from Martorano, giving him a false reason for being in New Jersey: "Not only did he not disclose this fact to me but he lied to me about the actual reason for his appearance in North Jersey." Martorano Affidavit, ¶ 4 (39a).[10]

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[9] Simone testified that he was aware of this predicament some two to four weeks *prior to* September 20, 1984. *United States v. Simone*, 627 F. Supp. at 1270 (citation to record omitted).

[10] Simone was not charged with Leonetti in the New Jersey extortion indictment. However, as a result of testimony given by Simone in contesting the government's effort to disqualify him as Leonetti's counsel in that case, Simone was indicted for perjury. He was tried and acquitted.

Martorano's motion was assigned to the Honorable Edward N. Cahn, Chief Judge. Pursuant to Rule 4(b) of Rules Governing Proceedings under Section 2255, the district court on January 26, 1995, ordered the government to respond. In its response, the government took the position that Martorano's motion was "frivolous" and should be denied without a hearing (26a).

The district court did just that, by Order of March 20, 1995 (App., *infra*, at A16-A21). In a footnote opinion, the district court saw "no need" for a hearing, believing it "clear from the record that Martorano's claim for relief is without merit" (App., *infra*, at A21). Recognizing that Martorano's earlier waiver might not extend to "non-tax related wrongdoings," *the court accepted the government's assertion that "Martorano has failed to show an actual conflict ever existed while Simone was representing him"* (App., *infra*, at A20). Relying upon a government affidavit that Simone was not a government "target" until 1986, the court concluded that any conflict would only have "materialized *after* Simone's representation of Martorano" (*id.*).[11] The court further noted that "petitioner has not offered any evidence suggesting that his defense was adversely affected or prejudiced in any way by Simone's non-tax related wrongdoings" (App., *infra*, at A19-A20).

Martorano appealed. The Third Circuit Court of Appeals rejected Martorano's Sixth Amendment claim, affirming the district court by unpublished Memorandum Opinion of January 5, 1996 (App., *infra*, at A1-A13). It did so for entirely different reasons than those given by the district court, however.

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[11] The district court believed, erroneously, that the investigations of Simone only arose after Martorano's case. *See* App., *infra*, at A20. In this respect, the court read too much from a prosecutor's affidavit, which offered no attestation that Simone was not a "subject" of ongoing investigations in 1983 and 1984.

The court of appeals viewed Martorano's motion as "remarkable" in four respects: (1) it lacked any allegation of non-compliance with Fed. R. Crim. P. 11 (App., *infra*, at A4);[12] (2) Martorano "did not contend that he was not guilty of the offenses to which he pleaded guilty," thereby placing himself in "the unappealing position of asking that the court set aside his plea of guilty even though he did not deny committing the offenses" (App., *infra*, at A5); (3) Martorano's materials lacked any assertion that the conflicts adversely affected Simone's performance, an omission the court would hold "fatal" (App., *infra*, at A6); and (4) Martorano had the "nerve" to make attestations of not knowing of Simone's criminal activities, which the appellate court discredited (*id.*).

This listing of the "remarkable" aspects of the case was then followed by two grounds upon which the court based its holding that Martorano was not entitled even to a hearing. First, that Simone's interests "did not diverge from Martorano's on any issue material to this case" (App., *infra*, at A10). Secondly, that Martorano never "alleged" in his papers that Simone's performance was affected by the conflicts (*id.*).

The court of appeals closed with an unusual "observation" as to the "surreal, almost farcical quality" of the proceedings (App., *infra*, at A13). Again emphasizing Martorano's guilt, the court clearly had little regard for his Sixth Amendment claim: "While we deny Martorano relief for the precise reasons we have set forth, it is entirely appropriate to point out that the totality of circumstances renders his case utterly devoid of equity" (*id.*). Martorano's ensuing request for rehearing, citing in detail the conflicts with Third Circuit precedents and with decisions of this Court, was denied without opinion (App., *infra*, at A22-A23).

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[12] This observation was puzzling. Martorano had previously raised a Rule 11 claim, which the same court of appeals rejected in *Martorano II*, thereby foreclosing the point.

REASONS FOR GRANTING THE WRIT

There are four reasons for granting the writ. The principal reason is to reconcile apparent inconsistencies in three of this Court's decisions on a recurring and important Sixth Amendment issue, as to which the circuit courts are now split. The remaining reasons all arise from the Third Circuit's refusal to honor long-standing decisions of this Court, as well as its departure from the accepted and usual course of judicial proceedings under 28 U.S.C. § 2255. The Third Circuit's decision simply cannot be reconciled with the many cases in which this Court has rejected "technical nicety" for motions under Section 2255, pronounced the right to counsel to be independent of a suspect's guilt or innocence, and required that contested facts be determined only after evidentiary hearing.

1. First and foremost, this case presents a question that has never been squarely resolved by this Court, and on which the lower courts are now split. That question – whether adverse effect is required to overturn a conviction, once an actual conflict has been proven – can only be answered by reconciling this Court's prior holdings in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), *Wood v. Georgia*, 450 U.S. 261 (1981), and *Strickland v. Washington*, 466 U.S. 668 (1984).

This issue has not gone unnoticed in the Court. Six years ago the Court declined to resolve it, denying certiorari in *Bonin v. California*, 494 U.S. 1039 (1990). Although the *Bonin* conflict was not borne of attorney criminality, the broader issue was recognized by two dissenting Justices as involving an "important and recurring" question, which the Court had "never squarely resolved." *Id.* at 1040, 1043 (Marshall, J., dissenting, with whom Justice Brennan joined).

Today, and particularly in the context of a case framed by allegations of defense counsel's related criminality, the issue is ripe for review. Neither *Wood*, nor *Strickland*, nor *Sullivan* involved a conflict of interest stemming from an attorney's personal involvement in criminal offenses linked to the ones with which his client was charged. In the six years since review was denied in *Bonin*, the circuit courts have continued to fragment on the question.

The Second Circuit has now squarely held that no adverse effect need be shown, where defense counsel is implicated in criminal activities related to his client. *United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993). In contrast, the Sixth and Ninth Circuits have required that even actual conflict involving attorney criminality must be accompanied by a separate showing of adverse effect to make out a Sixth Amendment violation. *See Taylor v. United States*, 985 F.2d 844 (6th Cir. 1993); and *Mannhalt v. Reed*, 847 F.2d 576 (9th Cir.), *cert. denied*, 488 U.S. 908 (1988).

The Third Circuit has in the present case squarely rejected the Second Circuit view, holding instead that adverse effect must be proven even in cases of related attorney criminality:

> Although the Court of Appeals for the Second Circuit apparently has dropped this requirement in certain cases, *see United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993), a case on which Martorano relies, our precedents, which are in harmony with *Strickland*, do not permit relief for a conflict of interest that does not adversely effect the attorney's performance.

App., *infra*, at A9. This case thus presents the Court with an opportunity to resolve the question of whether the adverse effect of an actual conflict of interest – particularly one arising from the lawyer's personal involvement in crimes linked to the petitioner's offenses – must

be separately proven, in order to obtain Sixth Amendment relief under 28 U.S.C. § 2255.

2. A second but related reason for granting the writ is that the Third Circuit – by insisting that a motion under Section 2255 must as a matter of form include a specific and distinct allegation of "adverse effect" – has wrongly imposed a hyper-technical pleading standard for post-conviction practice. Such insistence upon "technical nicety" squarely conflicts with a long-standing decision of this Court, *Rice v. Olson*, 324 U.S. 786 (1945), and is inconsistent with the Rules Governing Procedures under Section 2255. In rejecting Martorano's petition for failure to specifically plead "adverse effect" – an issue never addressed by the district court, not urged by the government, and not briefed by either party in the appellate court – the Third Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. A third reason for granting the writ is that the Third Circuit impermissibly conditioned the vindication of petitioner's Sixth Amendment right to counsel upon some assertion of innocence of the underlying offenses. Requiring a demonstration of innocence is flatly prohibited by this Court's decision in *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1956), and again is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

4. The fourth and final reason for granting the writ is that the Third Circuit, in refusing to credit the factual allegations of the petition – and even summarily determining issues of controverted fact against petitioner – deprived petitioner of the evidentiary hearing mandated not only by the clear language of Section 2255, but by this Court's holdings in *Machibroda v. United States*, 368 U.S. 487 (1962), and *Fontaine v. United States*, 411 U.S. 213 (1973).

A. This Court Has Never Squarely Decided Whether Adverse Effect Must Be Separately Shown, An Issue On Which The Courts Of Appeals Are Now Split.

1. The Issue Presented Is An Important One, Which Remains An Open Question In The Supreme Court.

The Sixth Amendment right to counsel is one of our most fundamental and cherished rights. *See Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) (assistance of counsel so basic to fair trial that infraction can never be treated as harmless error). It is well established that the Sixth Amendment right is one guaranteeing the accused the effective assistance of counsel, and encompassing "a correlative right to representation that is free from conflicts of interests." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). The right to counsel's undivided loyalty is central to the Sixth Amendment guarantee; when counsel is burdened by a conflict of interest, that guarantee is compromised.

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Court considered Sullivan's claim that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment, because his lawyers had a conflict of interest. The particular conflict involved the multiple representation of codefendants in a murder trial. The issue before the Court was whether the mere possibility of a conflict of interest warranted the conclusion that the defendant was deprived of his right to counsel. The Court said no: "We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350.

Sullivan left for another day the question of whether adverse effect should be presumed, once an actual conflict is proven. "*Sullivan* left unclear, . . . , whether an actual conflict should be presumed to have any adverse

effect, or whether a defendant must prove *both* an actual conflict *and* an adverse effect." *Bonin*, 494 U.S. 1039, 1043 (Marshall, J., dissenting).

One year later, in *Wood v. Georgia*, 450 U.S. 261 (1981), this Court at least implied that no separate showing of adverse effect was required. The Court vacated a probation revocation and directed the trial court to conduct a new revocation hearing, if it found that there was an actual conflict of interest not waived by the petitioners. Significantly, the Court imposed no requirement on petitioners to separately prove on remand that the conflict adversely affected their counsel's performance.

Later still, in its most recent decision on this issue, *Strickland v. Washington*, 466 U.S. 668 (1984), the Court seemed in dictum to suggest that reversal of a conviction required separate showings of actual conflict and adverse effect. Quoting from *Sullivan*, the Court noted that "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Id.* at 692.

The confusing interplay among the Court's three decisions needs to be resolved. In the past, at least two Justices have opined that a court "should presume adverse effect on counsel's performance once an actual conflict is shown." *Bonin*, 494 U.S. at 1043. The rationale for such a presumption is the usual impossibility of gauging how a conflict affected an attorney's performance. *Id.* at 1044-1045. This case is one particularly well-suited to now clarify what showing, if any, should be required to establish ineffective assistance, because it presents the grave circumstance of a conflict predicated upon counsel's involvement in related criminal activity.[13]

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[13] Although the Court has yet to review any conflict involving attorney criminality, such conduct is all too frequently before the lower courts. At least fourteen reported cases of

2. The Circuits Are Divided As To Whether Adverse Effect Must Be Separately Shown, Where The Ineffective Assistance Claim Is Based On Counsel's Related Criminal Conduct.

In the absence of any definitive Supreme Court guidance on the issue, the circuit courts have struggled to define the standard for ineffective assistance in cases involving attorney conflicts of interest. Particularly where actual conflicts arise from the attorney's own criminal acts, at least some courts have expressed their reluctance to require a separate showing of adverse effect. In what is sometimes termed a *per se* rule, the Second Circuit has gone so far as to presume adverse effect – with no separate showing required – from the presence of actual conflict, at least where the attorney's criminal acts are closely related to the offenses with which his client stands charged. *United States v. Fulton*, 5 F.2d 605 (2d Cir. 1993).

In *Fulton*, the court reversed a cocaine conspiracy conviction where defendant's counsel was alleged to have been engaged in heroin trafficking that related to the charge for which defendant was on trial. *Id.* at 612.

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ineffective assistance involve claims of actual conflict predicated upon defense counsel's own crimes or wrongdoing. *See, e.g., United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1322 (1996); *Stoia v. United States*, 22 F.3d 766 (7th Cir. 1994); *Taylor v. United States*, 985 F.2d 844 (6th Cir. 1993); *United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993); *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 500 U.S. 915 (1991); *Cerro v. United States*, 872 F.2d 780 (7th Cir. 1989); *Government of Virgin Islands v. Zepp*, 748 F.2d 125 (3d Cir. 1984); *Mannhalt v. Reed*, 847 F.2d 576 (9th Cir.), *cert. denied*, 488 U.S. 908 (1988); *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987); *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984); *Briguglio v. United States*, 675 F.2d 81 (3d Cir. 1982); *United States v. Salinas*, 618 F.2d 1092 (5th Cir.), *cert. denied*, 449 U.S. 961 (1980); *United States v. DeFalco*, 644 F.2d 132 (3d Cir. 1979); *United States v. Cannistraro*, 794 F. Supp. 1313 (D.N.J. 1992).

The court held that when counsel is implicated in criminal activities closely related to the charges against the client, there is a *per se* "adverse effect" on the representation. *Id. See also United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984) (conviction reversed under Sixth Amendment, where trial counsel had himself engaged in criminal activity with "possible co-conspirator" of his client). The Second Circuit continues to cite *Fulton* with approval. *See, e.g., United States v. Rubirosa*, No. 95-1200, 1996 WL 56501 (2d Cir. Feb. 9, 1996) (noting that the court has found *per se* violations of the right to counsel where defendant's attorney was implicated in defendant's crimes); *Kieser v. State of New York*, 56 F.3d 16 (2d Cir. 1995) (same); *United States v. Zackson*, 6 F.3d 911 (2d Cir. 1993) (same). *See also Kohler v. Kelly*, 890 F. Supp. 207 (W.D.N.Y. 1994), *aff'd*, 58 F.3d 58, *cert. denied*, 116 S. Ct. 531 (1995); and *United States v. Gambino*, 838 F. Supp. 749 (S.D.N.Y. 1993).

The Second Circuit does not stand entirely alone on this point. At least two other courts of appeal – the First and Seventh Circuits – have acknowledged that adverse effect may be presumed in cases when an attorney's conflict is particularly threatening to a defendant's Sixth Amendment rights.

The First Circuit in *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1322 (1996), rejected petitioner's claim of ineffective assistance based on his counsel's indictment in Austria on charges arising out of activities undertaken with the petitioner. The petitioner there had signed a waiver of the potential conflicts posed by his attorney's indictment,[14] and had also been represented at trial by another attorney who did not have

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[14] Here, in contrast, there was no waiver of any conflicts arising from Simone's non-tax related offenses. Thus, this case does not implicate the concern described in *Wheat v. United States*, 486 U.S. 153, 161-162, *reh'g denied*, 487 U.S. 1243 (1988), where a defendant waives a conflict and then later claims that he received ineffective assistance by virtue of that conflict.

a conflict of interest. Recognizing that some courts have "found a per se Sixth Amendment violation 'where trial counsel was implicated in the crime for which his client was on trial,' " the court observed that those "cases tend to involve circumstances in which an attorney has reason to fear that a vigorous defense of the client might unearth proof of the attorney's criminality." *Id.* at 772, quoting *United States v. Soldevila-Lopez*, 17 F.3d 480, 487 n.4 (1st Cir. 1994). *See also Dziurgot v. United States*, No. 90-1347, 1990 U.S. App. Lexis 20414 (1st Cir. Nov. 16, 1990) (suggesting court would apply a *per se* analysis where an alleged attorney conflict of interest was particularly "grave").

The Seventh Circuit has likewise suggested its willingness to presume adverse effect, in line with the Second Circuit's *per se* rule. In *United States v. Ziegenhagen*, 890 F.2d 937 (7th Cir. 1989), the court found an actual conflict of interest by virtue of defense counsel's previous appearance against defendant at a state sentencing hearing twenty years earlier. Quoting *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984), the court defined an actual conflict of interest as one 'which, by its nature, is so threatening [as] to justify a presumption that the adequacy of representation was affected.' *Id.* at 940.

In stark contrast to the First, Second, and Seventh Circuits' views of this issue, the Sixth and Ninth Circuits require that defendants separately prove *both* an actual conflict *and* an adverse effect. In *Taylor v. United States*, 985 F.2d 844 (6th Cir. 1993), the Sixth Circuit affirmed a conviction for multiple drug charges, even though the defendant's attorney was indicted for drug conspiracy five days after the defendant's drug trial. The court specifically imposed upon the defendant the burden of demonstrating that his attorney had an actual conflict of interest *and* that the conflict adversely affected his attorney's performance. *Id.* at 846.

In *Mannhalt v. Reed*, 847 F.2d 576 (9th Cir.), *cert. denied*, 488 U.S. 908 (1988), the Ninth Circuit reversed a

conviction for conspiracy, robbery, and possession of stolen property, where the defendant's attorney was accused of purchasing some of the stolen property from the defendant. The court required the defendant to show both that an actual conflict existed *and* that the conflict adversely affected counsel's performance. *Id.* at 581.

The Third Circuit has now joined with the Sixth and the Ninth, insisting that adverse effect be separately demonstrated – even when the actual conflict is one involving related attorney criminality.[15] It has done so by reliance upon *Strickland*, a precedent not involving attorney criminality. The court of appeals here expressly considered and rejected the Second Circuit rule of *Fulton*, electing instead to require a separate showing of adverse effect. "In our view, the petitioner in these cases must allege and prove that the conflict of interest adversely affected the attorney's performance . . . " (App., *infra*, at A10). As this case thus presents a conflict among the decisions of several United States courts of appeals on the same important and recurring issue, certiorari should be granted.[16]

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[15] The Third Circuit opinion signals a departure from its own earlier opinions in *Vance v. Lehman*, 64 F.3d 119, 124 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 736 (1996) (suggesting that adverse effect might sometimes be presumed); *Government of Virgin Islands v. Zepp*, 748 F.2d 125 (3d Cir. 1984) (attorney criminality as basis for actual conflict of interest); *Briguglio v. United States*, 675 F.2d 81 (3d Cir. 1982) (evidentiary hearing required to assess impact upon plea bargaining of government's investigation of attorney); and *United States v. DeFalco*, 644 F.2d 132 (3d Cir. 1979) (conflict due to indictment of defense counsel while client's appeal pending).

[16] To add to this confusion, the Fifth Circuit en banc has recently gone even further, holding that actual conflict at least sometimes must be accompanied under *Strickland* by a showing of "prejudice," and not merely adverse effect. *Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995), *cert. denied*, 1995 WL 770116 (Apr. 22, 1996). Although not involving attorney criminality, *Beets* shows

B. The Third Circuit's Insistence Upon "The Precise Niceties Of Technical Procedure" In The Pleading Of Adverse Effect Is At Odds With This Court's Precedent And With Applicable Court Rules.

The district court believed, erroneously, that no conflict existed while Simone was representing Martorano. The Third Circuit decided the case on a much different basis, emphasizing the absence in the motion papers of any specific allegation that the conflict of interest adversely effected the representation: "Martorano never claimed in his extensive papers filed in the district court . . . that Simone's performance was, in any way, affected by his alleged conflict of interest" (App., *infra*, at A10).

In so concluding, the panel disregarded the entire and plainly obvious thrust of Martorano's "extensive papers" – that Simone's endorsement of the plea bargain was infected by his own entanglements with co-conspirators Milan and DiSalvo, by his loyalties to Scarfo, and by the government's then-active investigations of his own conduct. Where trial risked the exposure of Simone's extortion of Milan (a named co-conspirator), and the exposure of DiSalvo's role in the drug conspiracy, it can hardly be said that Simone had no personal stake in whether Martorano pled guilty. Where Simone was himself bargaining for personal immunity, and acting at the same time as Scarfo's "accomplice," is it not plain that Martorano's plea "bargain" was struck by counsel lacking the "undivided loyalty" that the Sixth Amendment assures? Martorano did allege, after all, that Simone's conflicts were "impermissible" (21a), which in fairness ought to be enough to plead his case.

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the escalating confusion among the circuit courts as to what showing, beyond the actual conflict itself, is required for a claim of ineffective assistance.

Unwilling to give Martorano's Section 2255 papers their obvious import, the panel instead took the opportunity to invent – and impose – a case-dispositive hypertechnical rule of pleading. The sufficiency of the pleading was never at issue before the district court, nor did the government ever argue (in the district court or in its appellate brief) that the motion should be denied for failure to allege "adverse effect" with sufficient particularity.[17] The court nonetheless ruled that "Martorano was entitled to a hearing on his petition only if he pleaded, whether directly or on the basis of inference, a set of facts justifying the grant of relief" (App., *infra*, at A12).[18]

Why the appellate court would take this course, *particularly in the case of an inmate serving a sentence of life without parole*, is unstated. Insistence upon such "technical nicety" was a divergence from prior Third Circuit law,[19] has been previously forbidden by this Court, and is inconsistent with the Rules Governing Proceedings under Section § 2255.[20]

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[17] The sufficiency of the pleading was an issue raised *sua sponte* by the appellate court, at oral argument. Petitioner promptly submitted supplemental authorities on the point pursuant to Fed. R. App. P. 28(j) – including *Rice v. Olson*, 324 U.S. 786, 791-92 (1945) – none of which are anywhere mentioned in the Third Circuit opinion.

[18] The court rebuffed Martorano's argument that the adverse effect of Simone's conflicts could and should in fairness be inferred from the totality of his supporting papers, despite the absence of magic words. App., *infra*, at A12.

[19] *United States v. Flenory*, 876 F.2d 10, 11 (3d Cir. 1989) ("It would *elevate form over substance* to hold that [defendant's] motion should be denied for lack of jurisdiction because he cited Rule 35 rather than section 2255") (emphasis added).

[20] In finding Martorano's pleading inartful, the circuit court should at the very least have remanded the motion to the district court, with leave for the motion papers to be amended.

In *Rice v. Olson*, 324 U.S. 786, 791-792 (1945), this Court required that Section 2255 motions be read liberally:

> By treating this clumsily drawn petition with liberality, instead of dismissing it because of a failure to comply with the precise niceties of technical procedure, the state Supreme Court acted in accordance with its traditional solicitude for the writ. And this treatment is in line with federal practice. "A petition for *habeas corpus* ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice." *Holiday v. Johnston*, 313 U.S. 342, 350, 351.

(Footnotes omitted.)

Significantly, neither 28 U.S.C. § 2255, nor the Rules Governing Proceedings under Section 2255, nor the Model Form for Motions under 28 U.S.C. § 2255 remotely suggest any requirement that petitioners explicitly assert that they were adversely affected or prejudiced by the conduct of which they are complaining. In fact, Rule 2(b) of the Rules Governing Proceedings under Section 2255 provides *only* that:

> [The § 2255 motion] shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth *in summary form* the facts supporting each of the grounds thus specified.

(Emphasis added.) Additionally, the Model Form for Motions under 28 U.S.C. § 2255 specifically instructs petitioners to be succinct:

Such relief was specifically requested in the Petition for Rehearing, but that request went unacknowledged by the court of appeals.

> State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground.

Model Form, ¶ 12 (emphasis in original). Indeed, the Model Form even gives the following as an example of a ground for habeas relief: "Denial of effective assistance of counsel." Model Form ¶ 12(f). It is precisely this ground that is set forth, in even greater detail than the Rules require, in Martorano's petition.

The panel's affirmance of the district court's Order was thus grounded erroneously on a too stringent view of pleading requirements under § 2255, elevating form over substance. *Martorano, who has already served thirteen and a half years in prison, will thus be penalized for the rest of his natural life, because the circuit court thought his counsel should have added the words "adverse effect" somewhere in the § 2255 papers.* If there is anything about this case that can truly be said to be "utterly devoid of equity," it is such a result.

Apart from holding Martorano to a pleading standard inconsistent with this Court's direction in *Rice*, the court of appeals so far departed from the accepted and usual course of proceedings as to call for the exercise of this Court's power of supervision. The decision below stands in marked and unfortunate contrast to the teachings of other appellate cases. *See, e.g., Quintero v. United States*, 33 F.3d 1133, 1136 n.3 (9th Cir. 1994) (granting evidentiary hearing as to conflict of interest claim that was "not explicitly raised" in the district court, in order to prevent manifest injustice).

C. The Third Circuit's Insistence Upon Proof Of Innocence, As A Prerequisite To Vindication Of The Sixth Amendment Right To Conflict-Free Counsel, Is Prohibited By Decisions Of This Court.

In *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1956), this Court recognized that "constitutional rights of criminal defendants are granted to the innocent and the guilty

alike," and expressly declined "to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt."

Ignoring *Kimmelman*, the Third Circuit instead allowed its decision to be infected by an ill-conceived notion that innocence is prerequisite to proving ineffective assistance of counsel. The court deemed "remarkable" the fact that Martorano "did not contend that he was not guilty of the offenses to which he pleaded guilty," App., *infra*, at A5, and made a special effort to "point out" that the brief filed in support of Martorano's § 2255 motion "did not suggest that Martorano was not guilty of the crimes to which he pleaded guilty" (*id.*).[21] In fact, the court went so far as to opine that, "Martorano must have committed the crimes" (*id.*). The court several times returned to this theme, even noting in its concluding paragraph that "it is surely extraordinary for a defendant to rely on his guilt to set aside a guilty plea" (App., *infra*, at A13).

Innocence simply cannot be prerequisite to a guilty-pleading defendant's Sixth Amendment right to have his plea bargain negotiated and advised by conflict-free counsel. The Sixth Amendment guarantees all criminal defendants the right to counsel with undivided loyalty; even "guilty" defendants have the right to negotiate a favorable plea bargain, or to plead not guilty and go to trial, enjoying their constitutionally-guaranteed right to

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[21] The appellate court overlooked the fact that petitioner had consistently maintained his innocence as to at least some of the offenses, including the only count that made the life sentence applicable in this case. This was evident not only from papers of record in the case, such as Martorano's November 7, 1986 Motion Pursuant to Rule 32(d) to Withdraw Guilty Plea, but was specifically pointed out to the appellate court in Appellant's Reply Brief, at 2.

conflict-free counsel throughout any plea or trial proceedings.[22]

The Third Circuit decision conflicts with the fundamental guarantee of the Sixth Amendment as interpreted by this Court in *Kimmelman*. Completely misconceiving the scope of well-settled Sixth Amendment protections, the circuit court so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision.

D. By Discrediting Petitioner's Allegations, And By Determining Issues Of Controverted Fact Without An Evidentiary Hearing, The Third Circuit Proceeded Irregularly, Contrary To Statutory Provisions And To Decisions Of This Court.

Discrediting Martorano's allegations and reaching so far as to find facts favorable to the government – all without the benefit of an evidentiary hearing – the Third Circuit panel disregarded clear statutory language and contravened at least two well-established holdings of this Court. *See Fontaine v. United States*, 411 U.S. 213 (1973); *Machibroda v. United States*, 368 U.S. 487 (1962).

Section 2255 itself mandates that the district court "shall" grant a prompt hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. . . . " 28 U.S.C. § 2255. In *Fontaine*, the Court vacated and remanded the denial without a hearing of a § 2255 motion, citing the "clear" statutory standard that "calls for a hearing" on petitioner's detailed factual allegations "unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief[.]' " *Fontaine*, 411 U.S. at 215, quoting 28 U.S.C. § 2255.

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[22] The court of appeals seems not to have appreciated that a conflict-free counsel might well have bargained to eliminate the exposure to a life sentence.

Similarly, in *Machibroda* the Court vacated and remanded a denial of the petitioner's § 2255 motion, where the district court had determined – without a hearing – that the petitioner's allegations were false:

> We think the District Court did not proceed in conformity with the provisions of 28 U.S.C. § 2255, when it made findings on controverted issues of fact without notice to the petitioner and without a hearing. *United States v. Hayman*, 342 U.S. 205, 220. The statute requires a District Court to "grant a prompt hearing" when such a motion is filed, and to "determine the issues and make findings of fact and conclusions of law with respect thereto" unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the "files and records" in the trial court.

Machibroda, 368 U.S. at 494 (footnote omitted). *See also Sanders v. United States*, 373 U.S. 1 (1963).

Martorano's detailed allegations of Simone's conflicts – allegations that must be viewed in the light most favorable to Martorano – were amply supported by the files and records of the case. Martorano asserted that Simone was indicted for personally extorting drug monies owed to Martorano from Jimmy Milan, who was named by the government as one of Martorano's unindicted co-conspirators (49a); that Simone was later convicted for having supervised and profited from Anthony DiSalvo's illegal loan activities that, as Martorano attested in his affidavit, included providing monies to Martorano in connection with the very drug offenses to which Martorano plead guilty (39a); that Simone was the subject of at least two government investigations for criminal offenses that were underway at the time Simone was representing Martorano and in connection with which Simone had raised

the subject of immunity for himself (33a-34a); and that Simone's allegiance was to the Scarfo crime family, which threatened violence against the Martorano family. None of these circumstances, Martorano alleged repeatedly, were known to him at the time Simone was his counsel.

In the face of such factual allegations, the Third Circuit nonetheless concluded that there had been insufficient "showing" of any conflict of interest (App., *infra*, at A10). The appellate court did not directly address any of the facts alleged by Martorano, other than to itself make the altogether extraordinary (and disputed) factual finding that Simone's extortion of monies from Jimmy Milan was for a legal fee and must therefore have been known to Martorano (App., *infra*, at A6).[23] Nowhere in its opinion did the panel address Martorano's allegations that Simone was profiting from DiSalvo's illegal loan activity, that Simone had a higher allegiance to a criminal group that threatened violence against the Martoranos, or that Simone was the subject of at least two criminal investigations – all during the period that he was supposed to have been vigilantly representing Martorano's interest alone.

In disregarding Martorano's allegations of actual conflict, and in reaching so far as to instead find facts favorable to the government without any evidentiary hearing, the Third Circuit made a mockery of this Court's holdings in *Fontaine* and *Machibroda*. Such an outcome is especially perplexing, as the court of appeals purported to acknowledge "well-established rules" under its own precedents for reviewing Section 2255 motions (App., *infra*, at A8-A9). In others cases, the same court of appeals has not been reluctant to mandate evidentiary hearings

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[23] Martorano's papers, to the contrary, alleged that Simone extorted Milan and took the money for himself (not as a fee), during a time when Martorano was in prison awaiting trial (33a).

under Section 2255.[24] Here, however, the court so far departed from even its own accepted and usual course of proceedings as to call for the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 1, 1996

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[24] *See, e.g., Government of Virgin Islands v. Weatherwax*, 20 F.3d 572 (3d Cir. 1994) (district court erred in not holding an evidentiary hearing to determine the truth of assertions supported by affidavits and exhibits); *United States v. Dawson*, 857 F.2d 923 (3d Cir. 1988) (district court erred by not holding an evidentiary hearing on petitioner's nonfrivolous challenges to his convictions); *Briguglio v. United States*, 675 F.2d 81 (3d Cir. 1982) (remanding for evidentiary hearing, where petitioner alleged that his counsel had been under federal investigation).

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1240

UNITED STATES OF AMERICA

v.

GEORGE MARTORANO,
aka COWBOY

George Martorano,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 83-00314-1)
District Judge: Honorable Edward N. Cahn

Argued December 5, 1995

BEFORE: GREENBERG and MCKEE, Circuit Judges,
and ACKERMAN, District Judge*

(Filed: JAN 05, 1995)

MEMORANDUM OPINION OF THE COURT

GREENBERG, Circuit Judge.

George Martorano appeals from an order entered on March 20, 1995, denying his petition under 28 U.S.C. § 2255 to vacate, set aside or correct a sentence imposed by the district court. The district court entered the order relying on the record without holding an evidentiary hearing. The district court had imposed the sentence for various offenses arising out of narcotics transactions including engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848.

The procedural history of these section 2255 proceedings is as follows. Martorano, represented by F. Emmett Fitzpatrick, a Philadelphia attorney, filed his petition in the district court on November 10, 1994. In his petition he asserted that he was in custody at Marianna, Florida, pursuant to a sentence of life imprisonment without parole imposed in the district court on April 27, 1988, predicated on his plea of guilty. He asserted that he had appealed from the sentence but that we

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* Honorable Harold A. Ackerman, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

had affirmed it. Martorano set forth only one ground for relief in his petition and we quote it in full:

> Denial of effective assistance of counsel. At the time of guilty plea and sentence, defense counsel was the subject of an impermissible conflict of interest. During the recent trial of Robert F. Simone, who served as defense counsel, the evidence disclosed that at the time Mr. Simone advised me to plead guilty and sentence was imposed, he was under active investigation for his personal activities in a continuing criminal organization. He was described as a 'knowing accomplice to Nicodemo Scarfo, one of the bloodiest and most notorious mob bosses in the entir[e] country.[']

App. at 21.

Martorano attached his own affidavit to the petition as well as various other documents including a brief from Fitzpatrick's office, the indictment in the Eastern District of Pennsylvania (D.C. Crim. No. 91-00569) of Simone and Anthony DiSalvo for racketeering, extortion and collection of credit by extortion, the government's trial brief and sentencing memorandum in the Simone/DiSalvo case, an estimate of time that Martorano would have served for his convictions under United States Parole Board Guidelines, 40 to 52 months, and our opinion affirming Simone's and DiSalvo's convictions, United States v. DiSalvo, 34 F.3d 1204 (3d Cir. 1994).

Martorano's affidavit recited that Simone had approached him after his arrest in September 1983 and volunteered to serve as his attorney. At that time Martorano, who had known

Simone for many years, believed that Simone had represented many defendants charged with serious criminal offenses and enjoyed a reputation as a competent attorney. Martorano indicated that he had not known that Simone was "an active, personal participant in a continuing criminal organization" and, in particular, did not know that Simone was involved with DiSalvo. App. at 39. Martorano said that DiSalvo had supplied money to him "in the past and in connection with the crimes to which I pled guilty" and predicted that DiSalvo would have been a witness at his trial had he pleaded not guilty. Id. Martorano further admitted that "there were occasions that Mr. Simone was present when Tony DiSalvo and I discussed criminal financing." Id.

Martorano stated that he never discussed the government's evidence or trial strategy with Simone and that Simone advised him to plead guilty and throw himself on the mercy of the court, which would sentence him to no more than ten years' imprisonment. Martorano said that, predicated on his confidence in Simone, he did what Simone told him to do and responded to the guilty plea colloquy as Simone had instructed him. App. at 40. He did not claim, however, that his statements at the colloquy were not true or even that Simone told him to be untruthful at the colloquy. Martorano also stated that he did not discuss with Simone the possibility that he could receive life imprisonment without parole.

Martorano's petition and supporting documents are remarkable in four respects. First, he did not suggest that the court did not comply with Fed. R. Crim. P. 11 when he pleaded guilty. Thus, this is not a case in which the petitioner claims that he could not understand the potential consequences of the plea.

Second, he did not contend that he was not guilty of the offenses to which he pleaded guilty. Indeed, we draw the exact opposite inference from his affidavit as Martorano said: "Tony DiSalvo had supplied money to me in the past and in connection with the crimes to which I pled guilty" and that Simone had been present "when Tony DiSalvo and I discussed criminal financing." App. at 39. While Martorano further averred that he was unaware that Simone was DiSalvo's "criminal supervisor," id., in order to reach that point, we first must accept what amounts to Martorano's second admission of guilt in this case. If, as Martorano swore in his affidavit, DiSalvo supplied money to him in connection with the crimes to which he pleaded guilty, Martorano must have committed the crimes. Otherwise DiSalvo would have been supplying money in connection with events which never happened. In essence (as unbelievable as it sounds), Martorano prayed for relief from his guilty plea on the grounds that he is in fact guilty.

In this regard we point out that even Fitzpatrick's brief did not suggest that Martorano was not guilty of the crimes to which he pleaded guilty. The closest the brief came to doing so was in a statement that the government admitted in its trial brief that it "had to show [Martorano] was an organizer, supervisor or manager of the drug activity in order to obtain a conviction" under 21 U.S.C. § 848, but that his activities "could just as well have been viewed as a sale of drugs to an organization which would not necessarily have made him a leader or organizer." App. at 37. Yet, Fitzpatrick's brief did not assert that Martorano's sales were to an organization. Consequently, when Martorano filed his petition he placed himself in the unappealing position of asking that the court set aside his plea of guilty even though he did not deny committing the offenses and, in fact, premised his request in no small part on his guilt.

The third respect in which Martorano's petition and supporting documents are remarkable is that none of these materials asserted that the alleged conflict of interest adversely affected Simone's performance as Martorano's attorney. Thus, the conflict of interest was not material. As we shall demonstrate, this omission is fatal to Martorano's petition.

Fourth, and finally, in his affidavit Martorano protested, as we have indicated, that he had no knowledge that Simone "was an active, personal participant in a continuing criminal organization." App. at 39. Yet he emphasizes that in the district court, he contended that "Simone was engaged in criminal acts closely related to those for which he, Martorano was charged," brief at 28, and that "Simone was involved in collecting drug monies owed to Martorano by his unindicted co-conspirator, Jimmy Milan, and that Simone shared in income generated by DiSalvo giving money to Martorano to buy drugs," id. In fact, Martorano even relies on the government's allegation in its prosecution of Simone that the money collected by Simone from Milan was owed to Martorano and that Simone was collecting it as part of Martorano's legal fee. Apparently Martorano assigned Milan's debt to Simone. Brief at 12. Thus, Martorano in his petition claimed that he is entitled to relief because his attorney was involved in his own criminal affairs, and in making this argument, he has the nerve to characterize Simone's conflict of interest as "undisclosed." Brief at 19.

When the district court received the petition, it ordered the government to respond. The government then filed an extensive brief urging that "the record in this case shows that there was never any actual conflict of interest between Martorano and [Simone]" and that Martorano "offers no evidence to show that Simone's interests diverged with his own on any issue material to this case." App. at 174. The

government, like Martorano, included various documents with its papers. One document was a transcript of a hearing held before Martorano pleaded guilty in which the court district [sic] advised Martorano that Simone had been indicted for income tax evasion. At the hearing, after a thorough inquiry, Martorano waived any conflict of interest attributable to Simone's tax indictment. Not surprisingly, the government relied on this waiver as an alternative reason for denying Martorano's petition.

The district court rejected the petition in a memorandum opinion attached to its order. The court recited that a defendant is entitled to representation by an attorney of undivided loyalty but may knowingly and intelligently waive an attorney's conflict of interest. The court also said that there could be a case in which a waiver might not be valid but such cases would be "few and far between." United States v. Martorano, Civ. No. 94-6866, slip op. at 2 (E.D. Pa. Mar. 20, 1995). In this regard, the court quoted our opinion in United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), cert. denied, 500 U.S. 915-16, 111 S.Ct. 2009-11 (1991), that "it would be a rare case in which a defendant, after convincing the trial court not to disqualify his attorney of choice, should be able to obtain a reversal of his conviction on the basis of a conflict of interests. . . . If the defendant after disclosure insists on continued representation by the attorney and the court permits the representation to continue, any error is invited." Id. at 1143 n.84.

The court then indicated, citing Pungitore, that Martorano "has not offered any evidence suggesting that his defense was adversely affected or prejudiced in any way by Simone's non-tax related wrongdoings." Martorano, Civ. No. 94-6866, slip op. at 3 (citing Pungitore, 910 F.2d at 1141). The court also held that the circumstances of the case were not

such that it could presume there was an actual conflict. Finally, the court concluded that it was clear from the record that Martorano was not entitled to relief so that it would deny his petition without a hearing. Martorano then appealed.

There are certain well-established rules guiding us on this appeal. When a petition is filed under 28 U.S.C. § 2255 a court has discretion in determining whether to hold an evidentiary hearing. United States v. Day, 969 F.2d 39, 41 (3d Cir. 1992). In "exercising that discretion the court must accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record. Further, the court must order an evidentiary hearing to determine the facts unless the motion and files and records of the case show conclusively that the movant is not entitled to relief." Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). We will reverse a denial of habeas relief without a hearing and remand for further evidentiary development where the appellant alleges facts that if true would entitle him to relief. See Government of Virgin Islands v. Weatherwax, 20 F.3d 572, 574 (3d Cir. 1994).

A second principle governing this appeal is that we exercise plenary review in determining whether an attorney had an actual conflict of interest. United States v. Gambino, 864 F.2d 1064, 1071 n.3 (3d Cir. 1988), cert. denied, 492 U.S. 906, 109 S.Ct. 3215 (1989). Thus, while we will accept a petitioner's allegations of fact with respect to the conflict unless the allegations are clearly frivolous, we will decide as a legal matter whether the facts alleged, if established, constituted a conflict of interest. Id. As an example, we would accept a petitioner's factual allegation that an attorney had a conflict of interest because he represented two defendants in unrelated

cases, but we would reject the conclusion that such dual representation constituted a conflict of interest.

A third principle governing this appeal is that the conflict of interest must have adversely affected the attorney's performance. Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067 (1984); Pungitore, 910 F.2d at 1141. Although the Court of Appeals for the Second Circuit apparently has dropped this requirement in certain cases, see United States v. Fulton, 5 F.3d 605 (2d Cir. 1993), a case on which Martorano relies, our precedents, which are in harmony with Strickland, do not permit relief for a conflict of interest that does not adversely affect the attorney's performance.

We recognize that a conflict of interest can adversely affect the attorney's performance even though it does not prejudice the client. Thus, if a court concluded that as a product of a conflict of interest an attorney did not call a witness with evidence tending to exonerate a defendant, the court would not deny the defendant's petition under 28 U.S.C. § 2255 on the theory that the prosecution's case was so strong that the suppressed testimony could not have changed the outcome. Accordingly, a showing that a conflict of interest led to the defendant being prejudiced would be a sufficient but not a necessary basis for granting relief.

In this case, Simone advised Martorano to plead guilty. Consequently, we consider whether Simone while representing Martorano had conflicting interests that could have been served by advising Martorano to plead guilty. Stated another way, the question is whether Simone had a motive predicated on his conflict of interests to advise Martorano to plead guilty. If he had such a motive then Martorano would be entitled to relief even if he would have pleaded guilty regardless of Simone's

advice unless the waiver of the conflict to which we have referred bars the relief or unless the motive did not contribute to Simone giving the advice he gave.

We have reviewed this matter carefully and have determined that we cannot conclude on the basis of the showing in the district court that Simone had a conflict of interest which gave him reason to advise Martorano to plead guilty. Rather, we agree with the government that Simone's interests did not diverge from Martorano's on any issue material to this case. Thus, the district court properly denied Martorano relief without a plenary hearing.

There is a second, quite distinct and independent, reason why the district court properly denied Martorano relief without a hearing. As we have indicated, the court held that Martorano did not offer any evidence suggesting that his defense was adversely affected or prejudiced by Simone's non-tax wrongdoing. While we may, in essence, be saying the same thing as the district court, we have articulated the "adverse effect" component somewhat differently. In our view, the petitioner in these cases must allege and prove that the conflict of interest adversely affected the attorney's performance, not necessarily the petitioner or the defense. Pungitore, 910 F.2d at 1141.

In this regard one thing is clear: Martorano never claimed in his extensive papers filed in the district court, which we emphasize were prepared by an attorney, that Simone's performance was, in any way, affected by his alleged conflict of interest. In short, Martorano never alleged in the district court that the alleged conflict of interest caused Simone to advise him to plead guilty or even contributed to Simone giving that advice. Accordingly, the district court would have been justified in

dismissing Martorano's petition without requiring an answer from the government.

The closest that Martorano came to addressing the impact of the alleged conflict on Simone's representation was when he attached to his petition the government's trial brief in the Simone/DiSalvo case. That brief contains the following statement:

> Raymond 'Long John' Martorano was the father of George Martorano whom Simone represented in a drug case in 1983 and 1984. George Martorano plead[ed] guilty in 1984 and received a sentence of life imprisonment. Raymond Martorano was very bitter about Simone's handling of the case and threatened to kill Simone. After Scarfo was arrested he tried unsuccessfully to persuade Martorano that Simone had acted in good faith.
>
> After Leonetti was in prison as of April 1987, he was with his uncle Nicodemo Scarfo in Holmsberg [sic] prison. Toward the end of 1987 when they were visited by Simone, as they often were, they discussed a rumor that Raymond Martorano's conviction might be reversed and Martorano released on bail. Simone expressed to Scarfo his fear for himself and his son if Martorano got out of jail and Scarfo was still in jail. Scarfo assured Simone that he had arranged with LCN capo, Patty Specs, that if Martorano was released from jail, Scarfo would have him killed by Patty Specs.

App. at 110-11. Thus, the only reference in Martorano's filing to the impact of Simone's alleged conflicts on the attorney's performance is this hearsay statement by Scarfo that he thought, or at least said he thought, that Simone "had acted in good faith" in his representation of Martorano. Martorano is, of course, not bound by this statement, but it is the sole reference to Simone's motives in advising Martorano. Indeed, Scarfo apparently had such confidence in Simone that he was prepared to launch a preemptive strike in his behalf.

At oral argument, when we pointed out this deficiency to Martorano's attorney, the attorney suggested that we infer that allegation. We decline to draw that inference. It is one thing to infer from historical facts that a pleaded conclusion is justified. It is quite a different thing to infer a conclusion not alleged in the appropriate pleadings by the party seeking to have the inference drawn.

We also observe that the government claims it had a strong case against Martorano that could have led Simone legitimately to conclude that Martorano's best option was to tender a guilty plea. Martorano counters that Simone did not listen to the tape recordings incriminating Martorano. While it might be true that Simone did not listen to the tapes, the record does not support the allegation. On appeal, Martorano cites to his affidavit as the basis for the allegation, brief at 9, but the affidavit merely recites that Simone did not discuss the tapes with him, app. at 40. In any event, Martorano was entitled to a hearing on his petition only if he pleaded, whether directly or on the basis of inference, a set of facts justifying the grant of relief. This he did not do. In view of the two bases that we have concluded require us to affirm the district court's order, we do not consider the effect of the waiver following Simone's tax indictment.

In closing we make the following observation. In some respects these proceedings have a surreal, almost farcical quality. Martorano seeks relief from a lawful sentence imposed on a plea of guilty to crimes which he does not deny committing but which, instead, he impliedly admits he did commit. What's more, he actually relies on the fact that he is guilty because he predicates his claim for relief in part on his criminal involvement with DiSalvo. While we recognize that in criminal cases guilt or innocence sometimes becomes immaterial as, for example, when crucial but reliable evidence is suppressed, it is surely extraordinary for a defendant to rely on his guilt to set aside a guilty plea. The surreal quality of the proceedings is enhanced by Martorano's claim that he was ignorant of the scope of Simone's criminal activities, even though he acknowledged that he was criminally entangled with Simone. While we deny Martorano relief for the precise reasons we have set forth, it is entirely appropriate to point out that the totality of circumstances renders his case utterly devoid of equity.

The order of March 20, 1995, will be affirmed.

TO THE CLERK:

Please file the foregoing memorandum opinion.

Morton I. Greenberg /s/

Circuit Judge

DATED:

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1240

UNITED STATES OF AMERICA

v.

GEORGE MARTORANO,
aka COWBOY

George Martorano,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 83-00314-1)

BEFORE: GREENBERG and MCKEE, Circuit Judges,
and ACKERMAN, District Judge*

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* Honorable Harold A. Ackerman, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania, and was argued on December 5, 1995.

On consideration whereof, it is now ADJUDGED and ORDERED by this court that the order of March 20, 1995, be and is hereby affirmed.

ATTEST:

P. Douglas Sisk /s/

Clerk

DATED: JAN 05, 1995

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	
	:	CRIMINAL NO. 83-314-1
v.	:	
	:	CIVIL NO. 94-6866
GEORGE MARTORANO	:	

ORDER

AND NOW, this 20 day of March, 1995, upon consideration of George Martorano's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, and the

government's response thereto, it is hereby ORDERED that the motion is DENIED.[1]

BY THE COURT:

Edward N. Cahn /s/
Edward N. Cahn, Chief Judge

ENTERED: MAR 20, 1995

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1 The Sixth Amendment guarantees a defendant the right to counsel's undivided loyalty. See Government of Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984) (citing Wood v. Georgia, 450 U.S. 261, 271 (1981)). Accordingly, in the wake of Simone's indictment, the District Court was obliged to inquire about a possible conflict of interest between Simone and Martorano, Martorano's awareness of any such conflict, and whether Martorano wished to waive, and was able to waive, any such conflict. See Zepp, 748 F.2d at 139.

The District Court met this obligation by holding a hearing specifically regarding a possible conflict of interest. Judge Hannum thoroughly explored with Martorano possible conflicts of interest that could arise in his defense by Simone. At this hearing, Martorano "chose[] to retain [Simone] as counsel and ... waived any

right to alternative counsel knowingly, intelligently, and voluntarily." Tr. of Conflict of Interest Hearing at 11.

Generally, a defendant may waive the right to effective assistance of counsel if the waiver is knowingly and intelligently made. See Glasser v. United States, 315 U.S. 60, 71-72 (1942). Occasionally, however, even a knowing an intelligent waiver may be refused by the district court judge where there is a "serious potential for conflict," Wheat v. United States, 468 U.S. 153, 164 (1988). See also United States v. Dolan, 570 F.2d 1177, 1182 (3d Cir. 1978) ("exercise of the court's supervisory powers by disqualifying an attorney representing multiple defendants in spite of the defendants' express desire to retain that attorney does not necessarily abrogate defendants' sixth amendment rights"). This potential for conflict might be so strong that the judge not only is permitted, but indeed may be obligated to refuse waiver. See, e.g., Zepp, 748 F.2d at 139 (unclear whether a court could allow a waiver "when [the defendant's] own lawyer will testify against her" (citing United States v. DeFalco, 644 F.2d 132 (3d Cir. 1980))), reh'g denied, 454 U.S. 1117 (1981). Such was not the case here. Simone's indictment for evasion of income tax payments did not warrant a refusal of Martorano's waiver of conflict-free representation. See United States v. Rivera, NO. CIV.A. 93-2411, 1994 WL 242528 (E.D. Pa. 1994) (allowing waiver where attorney was under criminal investigation for tax evasion and obstruction of justice). In fact, the Court of Appeals for the Third Circuit has cited Martorano's waiver without the expression of reservation. See United States v. Martorano, 866 F.2d 62, 64 (3d Cir. 1989).

There may also be instances where information comes to light, after a knowing and intelligent waiver has

already been made, that casts doubt on the validity of said waiver. But these instances are few and far between:

> Of course, it would be a rare case in which a defendant, after convincing the trial court not to disqualify his attorney of choice should be able to obtain a reversal of his conviction on the basis of a conflict of interests. ... If the defendant after disclosure insists on continued representation by the attorney and the court permits the representation to continue, any error is invited.

United States v. Pungitore, 910 F.2d 1084, 1143, n.84 (3d Cir. 1990). Thus, conflicts of interest that are irreconcilable despite a valid and permissible waiver might exist only where facts unknown to the defendant and to the court at the time of waiver create a divergence of interests between defendant and counsel that is separate from any divergence created by the previously known facts and that actually affects counsel's performance. But see United States v. Hubbard, 22 F.3d 1410, 1418 (7th Cir. 1995) ("We need not determine whether additional facts created a conflict of constitutional magnitude, however, because [defendant] waived his right to conflict-free counsel").

Again, this is not the situation in this case. Leaving aside the question of whether Martorano knew the extent of Simone's involvement in the Scarfo mob, petitioner has not offered any evidence suggesting that

his defense was adversely affected or prejudiced in any way by Simone's non-tax related wrongdoings. See Pungitore, 910 F.2d at 1141 ("To justify a reversal, [a petitioner] must point to an actual conflict of interest which adversely affected his attorney's performance"); United States v. Robinson, NO. 92C3742, 1992 WL 373174, at *3 (N.D. Ill. 1992) (court dismisses argument by defendant that although he waived a potential conflict of interest based on an investigation of Simone for "simple tax offenses," he was not informed that Simone had been indicted for RICO offenses: "the potential conflicts in this case that arise from Simone being the target of various investigations do not vary based upon the nature of the federal offenses being investigated").

Nor does this case present a situation where an actual conflict of interest stemming from these additional wrongdoings may be presumed. For example, Simone did not negotiate or cooperate with the government concerning his own criminal charges while representing Martorano. See United States v. DeFalco, 644 F.2d 132, 137 n.5 (3d Cir. 1979). He was not limited in cross examination of any witness on account of having previously represented that witness. See United States v. Iorizzo, 786 F. 2d 52, 57 (2d Cir. 1986). Finally, while representing Martorano, Simone had not been implicated in the very crimes committed by Martorano. See Zepp, 748 F.2d 136; Manhalt v. Reed, 847 F.2d 576, 581 (9th Cir. 1988). Any such conflict between Simone and Martorano that might have existed materialized after Simone's representation of Martorano and, apparently, because of it. In short, the government is correct that "Martorano has failed to show an actual conflict ever existed while Simone was representing him." Government's Memorandum at 24.

It is clear from the record that Martorano's claim for relief is without merit. Accordingly, there is no need for a hearing on this matter. See Page v. United States, 462 F.2d 932, 933 (3d Cir. 1972).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1240

UNITED STATES OF AMERICA

v.

GEORGE MARTORANO,
aka COWBOY

George Martorano,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 83-00314-1)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and SAROKIN, Circuit Judges, and ACKERMAN, District Judge*

The petition for rehearing filed by the appellant, George Martorano, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

Morton I. Greenberg /s/
Circuit Judge

DATED: FEB 02 1996

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* Honorable A. Ackerman, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1240

UNITED STATES OF AMERICA

v.

GEORGE MARTORANO,
aka COWBOY

George Martorano,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 83-00314-1)

BEFORE: GREENBERG and MCKEE, Circuit Judges,
and ACKERMAN, District Judge*

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* Honorable Harold A. Ackerman, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania, and was argued on December 5, 1995.

On consideration whereof, it is now ADJUDGED and ORDERED by this court that the order of March 20, 1995, be and is hereby affirmed.

ATTEST:

P. Douglas Sisk /s/

Clerk

DATED: JAN 05, 1995

Certified as a true copy and issued in lieu
of a formal mandate on February 12, 1996.

Teste: P. Douglas Sisk /s/

Clerk, U.S. Court of Appeals for the Third Circuit.